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# In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 648. 684

WILBER D. REKEWEG,
*Petitioner,*

v.

OHIO STATE BAR ASSOCIATION,
*Respondent.*

## REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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## TABLE OF CONTENTS.


I. The Federal Constitutional Questions Urged by the Petitioner Were Sufficiently Raised in the Court Below ---------- 1

II. The Inherent Bias of the Hearing Panel Significantly Affected the Ruling Below ---------- 4

III. The Evidence Does Not Establish Moral Delinquency ---------- 6

Conclusion ---------- 7


## TABLE OF AUTHORITIES.

### Cases.


*Cleveland Bar Association v. Pleasant*, 167 Ohio St. 325, 148 N. E. 2d 493, cert. den. 358 U. S. 842 (1958) ---------- 2

*Dewey v. Des Moines*, 173 U. S. 193 (1899) ---------- 2

*Garland, Ex Parte*, 71 U. S. 333 ---------- 3

*Mahoning County Bar Association v. Ruffalo*, 176 Ohio St. 263, 199 N. E. 2d 396, cert. den. 379 U. S. 931 (1964) ---------- 2

*Sheppard v. Maxwell*, 384 U. S. 333 (1966) ---------- 5

*Terminiello v. Chicago*, 337 U. S. 1 (1949) ---------- 2

*Tumey v. Ohio*, 273 U. S. 510 (1927) ---------- 5


### Constitution of the United States.


Sixth and Fourteenth Amendments ---------- 2, 4

Eighth Amendment ---------- 7

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## REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

### I. The Federal Constitutional Questions Urged by the Petitioner Were Sufficiently Raised in the Court Below:

Respondent urges that with the "possible exception of the first question" the questions raised by the petition for certiorari in this disbarment case were not presented to the court below.[1] In this section of his reply brief, petitioner will refute this contention specifically with respect to each of the points urged in the petition. However, several general considerations are applicable to all points. First, it must be remembered that this action was initiated in the Supreme Court of Ohio upon recommendations and

[1] Respondent's Brief in Opposition to Petition for a Writ of Certiorari (hereinafter designated "Respondent's Brief") p. 6.

findings of that court's Board of Commissioners on Grievances and Discipline. In theory, as respondent recognizes,[2] the petitioner was not "tried" by the hearing panel whose recommendations and findings were submitted to the Court.[3] Accordingly, matters which were urged in the Supreme Court of Ohio were presented at the earliest stage at which legal questions could be presented. Secondly, petitioner sought dismissal before the panel upon broad constitutional objections (R. 375). Third, it is unnecessary for petitioner to adhere strictly to the language, theories or arguments which he advanced in support of the issues in the state courts.[4]

**Question I.** This question deals with the violation of petitioner's right to a trial by an impartial tribunal. Petitioner urged violation of his constitutional rights because of the inherent bias of the panel at the commencement of the hearing (R. 5-7). The issue of inherent bias violative of petitioner's due process rights was also specifically argued in the initial brief filed by him as respondent in the Supreme Court of Ohio.[5]

**Question II.** This question seeks broad recognition that disbarment proceedings are criminal trials for Sixth and Fourteenth Amendment purposes and encompasses Questions III through VII, inclusive. Petitioner urged the

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[2] Respondent's Brief, p. 7-81.

[3] *Cleveland Bar Association v. Pleasant*, 167 Ohio St. 325-335, 148 N. E. 2d 493, cert. den. 358 U. S. 842 (1958); *Mahoning County Bar Association v. Ruffalo*, 176 Ohio St. 263, 199 N. E. 2d 396, cert. den. 379 U. S. 931 (1964).

[4] *Dewey v. Des Moines*, 173 U. S. 193, 197-198 (1899); *Terminiello v. Chicago*, 337 U. S. 1, 5 (1949); *id.* at 7 (dissenting opinion).

[5] Brief of Respondent in the Supreme Court of Ohio, pp. 11-17.

applicability of the constitutional protections afforded in criminal cases in his brief in chief[6] and in his brief in support of his motion for rehearing.[7]

**Question III.** This question deals with the validity of a mere preponderance of evidence as a standard of proof in Ohio disbarment proceedings. While petitioner did not specifically object to the standard of proof, this objection is included and implicit in his broad assertion that he was denied the due process available to accused persons in criminal cases as described in the preceding paragraph.

**Questions IV and V.** These questions consider whether disbarment for commingling and embezzlement of estate funds solely upon proof of unconcealed appropriations of funds for fiduciary and attorney fees violates due process of law and the right to be informed of the nature and cause of the accusation against the petitioner. In his brief in the court below, petitioner urged that he could not lawfully be convicted of these offenses where the funds were taken in good faith under claim of right.[8] He also argued on motion for rehearing, that he had a constitutionally protected right to be disbarred only upon proof of "moral or professional delinquency."[9] These arguments sufficiently raised the question of absence of convicting evidence in a federal constitutional context.

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[6] Brief of Respondent in the Supreme Court of Ohio, p. 16.

[7] Motion for Rehearing and Brief in Support, pp. 1, 3, 6-7. This sixteen page motion and brief, as filed, is not paginated. Page references given herein refer to pages in the sequence in which they appear.

[8] Brief of Respondent in the Supreme Court of Ohio, p. 20.

[9] Motion for Rehearing and Brief in Support, p. 6, quoting from *Ex Parte Garland*, 71 U. S. 333, 379.

**Question VI.** Question VI considers violation of the Sixth and Fourteenth Amendments arising from denial to petitioner of the opportunity to confront his accusers. This argument was precisely urged before the Supreme Court of Ohio on motion for rehearing.[10]

**Question VII.** This question considers whether permanent disbarment of an attorney for commingling or embezzlement of funds from estate accounts by making unconcealed transfers to his personal account constitutes cruel and unusual punishment, particularly in the absence of prior disciplinary action. This argument was urged in the Supreme Court of Ohio in petitioner's initial brief, in which he contended that:

> "to disbar an attorney who has practiced law for more than a quarter of a century without a previous private or public reprimand constitutes either lack of due process or cruel and unusual punishment or both." [11]

Moreover, since petitioner could not have known the severity of his punishment until the Supreme Court of Ohio sentenced him at the conclusion of the proceedings below, this proceeding for a writ of certiorari was petitioner's first effective opportunity to raise this question.

For the reasons set forth above, petitioner contends that every question presented to this Court was adequately raised in timely fashion.

## II. The Inherent Bias of the Hearing Panel Significantly Affected the Ruling Below.

Respondent's assertion that petitioner should have presented evidence from the record in support of his "conclusion" that the hearing panel must have been biased [12]

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[10] Motion for Rehearing and Brief in Support, pp. 1, 3.

[11] Brief of Respondent in the Supreme Court of Ohio, p. 16.

[12] Respondent's Brief, p. 6.

misses the thrust of petitioner's argument—namely that prejudice is inherent and must be presumed from the composition of the panel's membership,[13] a group of uncompensated prominent attorneys with personal histories of connection with enforcement of discipline in the state bar and with membership in the prosecutorial bar association.

Respondent also alludes to the limitation upon the grievance board's power to enforce its findings and recommendations, arguing that since the Ohio Supreme Court, and not the board, tried the petitioner, the board's prejudice is of no consequence. However, the board is required by rule of court to submit its findings and recommendations to the court.[14] Presumably the court requires such findings and recommendations because it intends to use them. Moreover, while the court below was not bound to accept the board's recommendation, as pointed out in the petition for certiorari,[15] it gave great weight to the board's findings in this case, as demonstrated by the content of its opinion. The opinion below, after reciting several of the board's conclusions and its recommendation, ruled that the findings were "supported by the evidence" [16] and "its recommendation * * * warranted." [17] The court "therefore" ruled that "the report of the board is confirmed * * *." [18] In view of the court's attitude toward the board's product, the bias of the panel members can hardly be regarded as unimportant.

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[13] *Cf. Tumey v. Ohio*, 273 U. S. 510 (1927); *Sheppard v. Maxwell*, 384 U. S. 333 (1966).

[14] Rule XVIII (13) Rules of Practice of the Supreme Court of Ohio.

[15] p. 11.

[16] Petition for certiorari, Appendix A, p. 32.

[17] *Ibid.*

[18] *Ibid.*

## III. The Evidence Does Not Establish Moral Delinquency.

This reply brief will not repeat the analysis of evidence contained in the petition for certiorari. However, the recital of facts contained in the respondent's opposing brief[19] must be placed in context. In general, the only evidence offered by the respondent related to the fact of the transfers of funds. The interpretation of why the petitioner made such transfers was left to a biased panel which chose to adopt the respondent's view of the case. Moreover, that view of the case is unsupported by the record. For example, the alleged admission by the petitioner that he had misused estate funds was denied by him and contradicted by the record (R. 161, 325),[20] which discloses only that he had agreed to return a portion of a fee (*Ibid.*).

With respect to the first estate referred to in the respondent's brief,[21] the $6,655.00 received by the petitioner included compensation for services to the beneficiaries involving extensive successful litigation and negotiations for the recovery of property (R. 155-58).

In the other estate described by the respondent[22] the Bar Association's case rests upon the principle that the wrongful death proceeds of $35,000.00 may not be included in the computation of administrator's and counsel's fees for the administration of the estate.[23] Whether or not this position is technically correct, there is no question but that the amounts were claimed as fees; and to disbar an attorney for retaining a total of $13,500 in fees for a

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[19] Respondent's Brief, pp. 8-11.

[20] References designated with the prefix "R" refer to pages in the transcript of the proceedings before a panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio.

[21] Respondent's Brief, pp. 8-9.

[22] See Respondent's Brief, p. 9.

[23] *Ibid.*

$35,000 wrongful death recovery and the administration of an estate including that sum seems particularly harsh.

In each other estate, the amounts retained by the petitioner also reflected extensive services.[24]

In summation, the record is not such as to justify the conduct of the court below either in terms of due process or the Eighth Amendment's prohibition against cruel and unusual punishments. Nor is the record such as to palliate the consequences of trial by an inherently prejudiced tribunal.

## CONCLUSION.

For the foregoing reasons, the petitioner urges that the Court grant his petition for certiorari in this case.

Respectfully submitted,

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[24] See petition for certiorari, p. 6.